United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF AND APPENDIX

B
Pls

75-4092

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4092

SIMCHA RAIZMAN,

Petitioner,

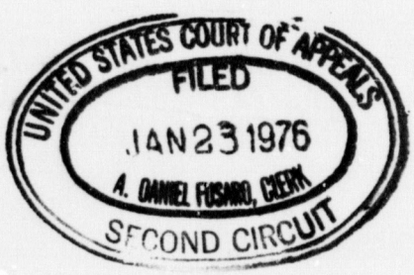
—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON PETITION TO REVIEW DEPORTATION ORDER
UNDER 8 U.S.C. 1105(a)

PETITIONER'S BRIEF AND APPENDIX



EDWARD L. DUBROFF
Attorney for Petitioner
50 Court Street
Brooklyn, New York 11201
(212) MAin 4-5524

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-4092

SIMCHA RAIZMAN,

Petitioner,

against

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition to Review Deportation Order

Under 8 U.S.C. 1105(a)

PETITIONER'S BRIEF

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Is a conviction for attempted possession of hashish the same as a conviction for attempted possession of marihuana, so as to make the convicted person excludable from entering the United States, by reason of the provisions of §212(a)(23) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(23)?

STATEMENT OF THE CASE

This proceeding involves an alien's petition for judicial review of administrative agency action, i.e., a decision and order of the Board of Immigration Appeals of the United States Department of Justice, directing that the petitioner be deported from the United States.

The petitioner is a 31-year-old male, a native of Russia, and a citizen of Israel, who entered the United States at New York, N.Y., on January 26, 1971, as a visitor for business. He was authorized to remain in the United States until July 26, 1971. He remained in the United States beyond that authorized date without further authorization from the Immigration and Naturalization Service (hereinafter referred to as the "Service").

The petitioner was married to a native-born United States citizen on May 11, 1971, at New York City, and he resides with her and with their two native-born United States citizen infant children, 4 years, and 16 months of age, respectively. He is presently self-engaged in business as the proprietor of an electronics store.

Petitioner's wife filed a visa petition with the Service in his behalf, to accord him "immediate relative" immigration status, and her petition was approved by the District Director at New York, N.Y. on July 22, 1971.

Petitioner thereafter applied to the District Director at New York, N.Y. for adjustment of his status to that of a permanent resident under the provisions of

§245 of the Immigration and Nationality Act (hereinafter referred to as the "I.&N. Act") 8 U.S.C. 1255, basing his application on his "immediate relative" immigration status.

In that adjustment of status proceeding, petitioner revealed that he had been convicted in Israel in the year 1967 for the commission of a crime, and he submitted to the Service a copy of the verdict and sentence of the Israeli Court. The "Charge Sheet" referred to in the verdict was not included in the transcript of the court's record.

In a sworn statement, which the petitioner made to the Service in the §245 proceeding (Administrative Record, Item #19), he admitted that the conviction referred to in the court record concerned possession of hashish. It is to be noted that he was not found guilty or convicted of possession of hashish, but only of attempted possession of that substance.*

In that statement to the Service, the petitioner claimed that he did not know that the substance was drugs, and that he was mailing the package for a friend to a

---

* The issue and claim that a conviction for attempted possession was not the same as a conviction for possession, so as to sustain a deportation because of a conviction "relating to" illicit possession (of marihuana) was raised by petitioner in a later appeal to the Board of Immigration Appeals. It is not now raised on this appeal by reason of the adverse decision of this Court on the same issue in the case of Bronsztejn v. I.N.S., Docket No. 75-4060, No. 197, September 1975 Term, December 2, 1975, unreported.

girl in another country. His application for adjustment of status was denied by the District Director, the Israeli conviction being cited therein as a bar to a visa, by reason of the provisions of §212(a)(23) of the I.&.N. Act, 8 U.S.C. 1182(a)(23).

Subsequent to the denial of the application for adjustment of status, the Service commenced deportation proceedings against the petitioner by issuance of an order to show cause on June 25, 1974, seeking his expulsion from the United States, on the ground that after entry as a visitor for business, he had remained longer than permitted.

In a deportation hearing before an Immigration Judge, held on July 2, 1974, the petitioner admitted the factual allegations and legal conclusions contained in the order to show cause issued against him, and thereby conceded deportability, but sought to avoid deportation by renewing his application for adjustment of status to that of permanent resident under the provisions of §245 of the Act. The right to so renew, without prejudice, an adjustment of status application in deportation proceedings is conferred by the provisions of 8 C.F.R. 245.2(a)(4).

The Immigration Judge rendered a written decision on August 6, 1974 (Administrative Record, Item #12), which was adverse to petitioner, holding that petitioner was ineligible, under §212(a)(23) for adjustment of status under §245, because of his conviction in Israel, under the prohibition applying to

> "Any alien who has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to illicit possession of or traffic in narcotic drugs or marihuana * * *."

It was ordered that the adjustment application be denied, that petitioner be deported to Israel on the charge contained in the order to show cause, but that the petitioner have the privilege of voluntary departure from the United States by a given date, without expense to the Government.

Petitioner then appealed, as of right, to the Board of Immigration Appeals, claiming, among other things, that a conviction for possession of hashish is not a conviction for possession of marihuana, and therefore that he was not subject to the strictures of §212(a)(23) of the Act.

On February 20, 1975, the Board of Immigration Appeals rendered an adverse decision (Administrative Record, Item #2), sustaining the Immigration Judge's decision as being correct. The petition herein to review such agency action was then filed with this Court.

STATUTES INVOLVED

Immigration and Nationality Act, as amended, §212(a); 8 U.S.C.§1182(a):

> "Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> "(23) Any alien who has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, or any salt derivative or preparation of opium or coca leaves, or isonipecaine, or any addiction-forming or addiction-sustaining opiate;

or any alien who the consular officer or immigration officers know or have known to believe is or has been an illicit trafficker in any of the aforementioned drugs;"

Section 241(a); 8 U.S.C. §1251(a);

"Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who * * *

"(2) * * *is in the United States in violation of this Act or in violation of any other law of the United States;

"(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation,

exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate;"

Section 245(a) 8 U.S.C. §1255(a):

"The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved."

ARGUMENT

POINT I

A CONVICTION RELATING TO POSSESSION OF HASHISH IS NOT A CONVICTION RELATING TO POSSESSION OF MARIHUANA WITHIN THE LANGUAGE AND INTENT OF §212(a)(23) OF THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED.

A basic question to be determined in this case is whether the possession of "hashish" is the same as the possession of "Marihuana", within the meaning and intent of §212(a)(23) of the I.&N. Act.

The same issue was raised but was not decided by this Court in the case of Lennon v. Immigration and Naturalization Service, unreported, Docket No. 74-2189. The Court decided that case on another issue, namely, whether the foreign statute under which the conviction was had made guilty knowledge irrelevant. However, in Footnote #17 to its decision of October 7, 1975, this Court noted that it was therefore unnecessary for it to rule on the "hashish"/"marihuana" issue.

In the instant case under review, the Government introduced no testimony or evidence as to the meaning of the term "hashish" at the deportation hearing, but claimed generally, and relied specifically, on the decision by another Immigration Judge in the Lennon case, that the term "hashish" was synonymous with the term "marihuana" as used in §212(2)(23) of the Act.

In the Lennon case, the Government introduced no testimony or evidence as to the meaning of the term "Cannabis Resin" (i.e., "hashish") at the Lennon's deportation proceeding, but claimed generally in its brief that the term was synonymous with the term "marihuana" as used in §212(2)(23) of the Act.

On the other hand, Lennon introduced the testimony of and a textbook written by an acknowledged expert in the field, Dr. Lester Grinspoon, whose outstanding qualifications were conceded by the Trial Attorney in that case.

Dr. Grinspoon testified in the Lennon case (Lennon, App. 86), as follows:

> "Q. Is Cannabis Resin Marijuana?
>
> A. Cannabis Resin is not marijuana.
>
> Q. Is Cannabis Resin a narcotic drug?
>
> A. Cannabis Resin is not a narcotic drug."

Dr. Grinspoon went on to define marijuana as "the cut part of the Cannabis Sativa plant* * *a cutting of the parts usually mixed with stems and seeds and so forth and so on" (Lennon, App. 86).

He further testified that there is no question that marijuana refers to just this particular form of the plant and not to the resin (Lennon, App. 87).

Thereafter the expert witness concluded his direct testimony as follows (Lennon, App. 87):

"Q. Based upon your knowledge and experience, and research in this field, would I be correct in saying that it is your opinion that Cannabis Resin is not marijuana?

A. Cannabis Resin is not Marijuana. Marijuana is not Cannabis Resin."

On cross-examination, the witness testified that cannabis resin was the "source" of hashish, but that it has to be treated by being dried and heated before it could be used as hashish (Lennon, App. 89).

In the Lennon case, the expert witness was not recalled by the Service, as the Trial Attorney for the Service reserved the right to do, and the Service offered no testimony whatever on this issue.

In the case presently under review, the Immigration Judge relied on the other Immigration Judge's adverse decision in the Lennon case, at the same time recognizing that the Lennon case was on appeal before the Board of Immigration Appeals.

On the Lennon appeal, the Board of Immigration Appeals held adversely and rejected his contention. The Board felt that the court decision which established that hashish is "a refined form of marijuana" applied to Lennon's case (Lennon, App. 362 et seq.).

Concededly, the relation between hashish and marijuana is a subject of dispute among experts.

In the Lennon case, if the Immigration Judge had before him proof introduced by the Service contradicting Dr. Grinspoon, he might have weighed the evidence and rejected Dr. Grinspoon's testimony. But he had no proof whatever conflicting with what Dr. Grinspoon had said or challenging his acknowledged qualifications as an outstanding expert in the field. In this context, the applicable rule is the one stated by the Ninth Circuit in Franklin Supply Co. v. Tolman, 454 F.2d 1059, 1071 (9th Cir. 1972):

> "Where the answer is one requiring evidence from a professional and that evidence is received, not contradicted and no reason appears to doubt the credibility of the witness or the accuracy or inherent probability of the opinion, the fact should be deemed established."

To be sure, expert testimony may be appraised by a factfinder along with all other proof, and the credibility of the witness is an important factor in such an evaluation. But, as this Court noted in Alvary v. United States, 302 F.2d 790, 794 (2d Cir. 1962):

> "A trial judge cannot arbitrarily disregard all the expert testimony in the record and rely upon his unsubstantiated personal beliefs instead of upon evidence."

Courts have overturned administrative conclusions, particularly when an administrative agency goes outside its record to take official notice of some fact that the parties dispute. (See, e.g., Glendenning v. Ribicoff, 213 F. Supp. 301 (W.D.Mo. 1962); United States. ex rel. Ott v. Shaughnessy, 116 F. Supp. 745 (S.D.N.Y. 1953).

This rule applies all the more with respect to Immigration Service proceedings, where Congress' policy is most clearly stated. Describing the functions of the Immigration Judge (called a "special inquiry officer" by the statute), §236(a) of the Immigration and Nationality Act, 8 U.S.C. §1226(a), states expressly:

> "The determination of such special inquiry officer shall be based only on the evidence produced at the inquiry."

The short of the matter is that in the Lennon case, there was no evidence whatever in the record regarding the character of cannabis resin other than Dr. Grinspoon's clear and unqualified testimony that it is not marijuana.

In the case under review, there was no evidence or testimony whatever on the part of the Government that "hashish" was the same substance as "marihuana" so as to invoke the strictures of §212(a)(23) of the Act.

Two final points should be made in this regard. First, it is essential to recall that in deportation cases the evidentiary standard that must be met to sustain

deportability is "clear, unequivocal and convincing evidence." Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 285-86 (1966). The "clear, unequivocal and convincing evidence" in this record not only does not support petitioner's deportation; it affirmatively demonstrates that the basis for deportation -- that he was convicted of an offense involving marihuana possession -- is wrong.

Second, the factual nature of the inquiry -- whether cannabis resin or hashish (its derivative) is the same as marihuana -- has been resolved by the Service in another case on another record, in precisely the opposite way. In Matter of Gray, File No. A30-310-271, decided on September 2, 1971, unreported, an Immigration Judge ruled as follows:

> "The statute under which it is alleged that the applicant is excludable refers to 'narcotic drugs' and to 'Marijuana.' The applicant was convicted of possession of hashish. There is no allegation here that hashish is a narcotic drug. It is urged that hashish should be included in the term 'marijuana' because both are derivatives of Cannabis Sativa. However, neither 'hashish' nor 'Cannabis Sativa' are mentioned in the statute.

> "On consideration of this entire record, and in the absence of any law, regulation or decision of the Board or of any Court finding that the words 'hashish' and 'marihuana' are the same or interchangeable, it will be concluded that the applicant has not been convicted in violation of law relating to possession of a 'narcotic drug' or 'marijuana'."

The Service thereafter withdrew an appeal it had filed in the case. The alien in that case was thereby rendered not excludable under §212(a)(23) of the Act.

Thus, it is evident that even within the Service itself, there is divided opinion as to whether "hashish" is the same substance as "marihuana."

POINT II

DEPORTATION STATUTES, BECAUSE OF THEIR DRASTIC CONSEQUENCES, MUST BE STRICTLY CONSTRUED.

The cases of Barber v. Gonzales, 347 U.S. 637, 642-643 (1954), and Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948), hold that because of their drastic consequences, deportation statutes must be strictly construed. See also, Bronsztejn v. I.N.S. (2d Cir. 1975, unreported, No. 197, September 1975 Term). This principle was cited and followed in a memorandum dated March 27, 1974 from

the Solicitor General to the General Counsel of the Immigration and Naturalization Service, constituting part of the "Appendix" to a decision of the Board of Immigration Appeals in Matter of Andrade, Interim Decision No. 2276, decided April 5, 1974.

Such a careful analysis of the statute is mandatory under established constitutional and judicially evolved principles. As Chief Judge Kaufman said (while a District Judge) in Mirabel-Balon v. Esperdy, 188 F. Supp. 317, 319 (S.D.N.Y. 1960);

> "I recognize the well-settled and salutary principle of statutory construction that, when a statute imposes penal or other harsh consequences, it is to be strictly construed. Any ambiguities are to be resolved in favor of leniency."

See also, Costello v. Immigration and Naturalization Service, 376 U.S. 120, 128 (1964); Bonetti v. Rogers, 356 U.S. 691, 699 (1958); Bridges v. Wixon, 326 U.S. 135, 148 (1945). It takes no stretching of the statutory language to read it as requiring strict proof of each of the elements of the applicable section, i.e., a conviction of a violation of any law or regulation relating to the traffic in or illicit possession of narcotic drugs or marihuana.

A conviction for possession of hashish should not be regarded as the basis for deportation (or exclusion) of an alien on the ground of conviction of possession of marihuana, in the absence of persuasive reasons or a clear statement of Congressional intent.

Congress has not manifested such an intent in either §241(a)(11) or §212(a)(23) of the Act, nor are there any persuasive reasons for such a construction.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the decision of the Board of Immigration Appeals, denying adjustment of status and ordering deportation, be rejected.

Dated: January 22 , 1976.

Respectfully submitted,

EDWARD L. DUBROFF
Attorney for Petitioner
50 Court Street
Brooklyn, New York 11201

APPENDIX

DECISION AND ORDER OF THE IMMIGRATION JUDGE, DATED AUGUST 6, 1974

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A19 469 039 - New York

AUG 6 1974

In the Matter of)

OLECHIA KALIMAN)

Respondent)

IN DEPORTATION PROCEEDINGS

CHARGE: I & N Act - Section 241(a)(2) (8 USC 1251(a)(2)) - remained longer - visitor

APPLICATION: I & N Act - Section 245 (8 USC 1255) - adjustment of status to permanent resident; in alternative, voluntary departure

In Behalf of Respondent:

Thomas T. Hecht, Esq.
1270 Avenue of the Americas
New York, N. Y. 10020

Edward Dubroff, Esq., of counsel

In Behalf of Service:

William Dunlop, Esq.
Trial Attorney

DECISION OF THE IMMIGRATION JUDGE

Deportability is conceded. Respondent, now 30, alien, native of Russia, citizen of Israel, was admitted to the United States January 26, 1971 as a visitor till July 26, 1971. Without authority he remained longer. He is deportable.

Respondent asks to be excused from deportation. Primarily he seeks adjustment of status, under provisions of Section 245 of the Immigration and Nationality Act, to that of a lawful permanent resident. In the alternative

he requests voluntary departure. Respondent's Section 245 application is a renewed request. On March 16, 1972 the District Director, New York, N. Y., denied respondent's request for Section 245 benefits. As is his right respondent renewed the request before us.

On May 10, 1967 respondent had been convicted in the District Court of Tel Aviv, Israel for, among other things, violation of Sections 4, 7 and 16 of that country's Dangerous Drugs Ordinance, 1937, attempted possession of hashish.

Eligibility for Section 245 benefits includes the requirement that applicant establish the immediate availability to him of an immigrant visa and admissibility to the United States for permanent residence. Section 212(a)(23) of the Immigration and Nationality Act precludes those things to:

> "Any alien who has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana..."

Respondent's hearing before us was contingently closed July 2, 1974 when it was agreed that his Section 245 application be bound by the decision of the Board of Immigration Appeals in the then undecided appeal of Matter of Lennon, A17 595 321.

The Board's decision July 16, 1974, Int. Dec. ____, was adverse to the appeal of Lennon from a determination that he was encompassed by the above cited portion of Section 212(a)(23) of the Immigration and Nationality Act and thus not eligible for Section 245 benefits. The Board's

decision dismissing Lennon's appeal observed that several of our Circuit Courts of Appeals had noted that hashish was merely a refined form of marihuana (Board's print, pages 28, 29).

Because of respondent's referred to conviction and the provisions of Section 212(a)(23) of the Immigration and Nationality Act he is not eligible for Section 245 benefits (cf. Matter of G-, 6 I&N Dec. 353). His request for Section 245 benefits must again be denied.*

Respondent is, however, eligible for voluntary departure. As a matter of discretion that will be authorized. Should respondent now not exercise that privilege as now required deportation will be ordered. Respondent designates Israel as his destination should deportation ensue.

ORDER: IT IS ORDERED that respondent's application, under provisions of Section 245 of the Immigration and Nationality Act, for adjustment of status to that of a permanent resident be denied.

IT IS FURTHER ORDERED that in lieu of an order of deportation respondent be granted voluntary departure without expense to the Government on or before NOV 7 1974 or any extension beyond such date as may be granted by the District Director, and under such conditions as the District Director shall direct.

* This denial is mandated though respondent is married to a United States citizen by whom he has a 2½ year old citizen child and though birth of a second child is expected September 15, 1974.

IT IS FURTHER ORDERED that if respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: respondent shall be deported from the United States to ISRAEL on the charge contained in the Order to Show Cause.

Edward P. Emanuel

EDWARD P. EMANUEL
Immigration Judge

DECISION AND ORDER OF THE BOARD OF IMMIGRATION APPEALS, DATED FEBRUARY 20, 1975

United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

FEB 4 - 1975

File: A10 469 030 - New York

In re: SIDNEY PATTMAN

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Edward L. Dubroff, Esq.
50 Court Street
Brooklyn, New York 11201

Attorney of record:
Thomas T. Hecht, Esq.
1270 Avenue of the Americas
New York, New York 10020

ON BEHALF OF INS SERVICE: Paul C. Vincent
Appellate Trial Attorney

ORAL ARGUMENT: November 26, 1974

CHARGE:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2)) - Nonimmigrant visitor - remained longer

APPLICATION: Adjustment of status; voluntary departure

In a decision dated August 6, 1974, the immigration judge found the respondent deportable as charged, denied his application for adjustment of status under section 245 of the Immigration and Nationality Act, and granted the respondent the privilege of departing voluntarily

A19 462 039

from the United States within 92 days in lieu of deportation. The respondent has appealed from that decision. The appeal will be dismissed.

The alien respondent has conceded deportability. The only issue on appeal involves the immigration judge's determination that the respondent was statutorily ineligible for adjustment of status under section 245 of the Act, because he was inadmissible to the United States under section 212(a)(23) as one convicted of violating a law relating to the illicit possession of marihuana.

The record indicates that the respondent was convicted in 1967 in Israel for the crime of attempted possession of hashish. Counsel argues that hashish is not "marihuana" within the meaning of section 212(a)(23). That issue was decided adversely to the respondent in Matter of Lorenc, Interim Decision 2304 (BIA 1974).

Counsel also contends that a conviction for attempted possession is not a conviction for "possession" within the meaning of section 212(a)(23). That issue was decided adversely to the respondent in Matter of Bronsztejn, Interim Decision ____ (BIA November 26, 1974). 1/

The immigration judge's decision was correct. The appeal will be dismissed.

1/ We note that Bronsztejn was decided the same day as oral argument in the present case, so counsel did not have an opportunity to familiarize himself with that case prior to argument. A copy of the Bronsztejn was mailed to counsel and he was given an opportunity to submit a reply memorandum with respect to the issue decided in Bronsztejn. Counsel informed us by letter dated December 5, 1974, that he did not wish to submit a memorandum in reply.

A19 469 039

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order, the respondent is permitted to depart from the United States voluntarily within 92 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

Chairman

(2)

COPY RECEIVED
Thomas J. Cahill Jr.
UNITED STATES ATTORNEY
1/23/76

THE ALPERT PRESS INC., 644 PACIFIC ST. BKLYN. N.Y.